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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-42

MELVIN S. BORNSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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II. Certiorari should be granted to review the holding of the Court below to the effect that the petitioner failed to make out a case for dismissal of the indictment for prejudicial pre-indictment delay, because the witnesses who died prior to trial would ". . . both . . . have incriminated Bornstein if they were alive and had testified. Their death prior to trial was in effect prejudicial to the prosecution and not the defense." In so hold-

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ing the Court failed to recognize that a defendant has a right to meet charges against him promptly while his evidence is still available and not rely exclusively on infirmities in the government's case against him as guaranteed by the Sixth Amendment right to speedy trial.

III. This Court should grant certiorari to settle the question whether the denial of a separate trial, when the co-defendants have mutually exclusive defenses, and the testimony of one, if called as a witness in a separate trial, might exculpate the other, is a denial of due process of law as guaranteed by the Fifth Amendment.

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No.

MELVIN S. BORNSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on June 9, 1971.

The Opinion Below

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of conviction of Petitioner in the use of the mail to further a scheme to defraud in violation of 18 U.S.C. 1341. Petitioner was tried in the District Court by a jury and there is no opinion of that Court.

Jurisdiction

The judgment of the United States Court of Appeals was entered on June 9, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Did the Court below err in holding that the District Court did not abuse its discretion in refusing to allow the Petitioner a continuance to obtain separate counsel, and thus implying that separate counsel were not required and further err in failing to reverse because the District Court did not advise the Petitioner of the risks to the Petitioner and his co-defendant in proceeding, represented by the same attorney?

2. Did the Court below err in its conclusion that the Petitioner did not make out a case for dismissal of the indictment for pre-indictment delay when the indictment was returned four days prior to the end of the period of the statute of limitations, the Defendant was not informed that he was under investigation until the return of the indictment, and all the documents relevant to the subject of the indictment had been in the possession of governmental authorities, either State or Federal, during the greater part of the five year period? And where in fact three witnesses died and the co-defendant destroyed records in the pre-indictment period?

3. Was the Petitioner denied due process of law, as guaranteed by the Fifth Amendment, in that he was denied a trial separate from his co-defendant, in a

case where, if the co-defendant had been called as a witness in a separate trial, his testimony could have exculpated the Petitioner?

Constitutional Provisions Involved

Amendment V

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial . . . and to have the assistance of counsel for his defense.

Statute Involved

The statute under which the Petitioner was convicted is 18 U.S.C. 1341, which states as follows:

> 18 U.S.C. 1341 Frauds and Swindles
>
> Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the

> place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The construction of the statute is not an issue in this Petition.

Statement of the Case

Petitioner was convicted in the United States District Court for the Northern District of Illinois, Eastern Division at Chicago, for mail fraud in violation of 18 U.S.C. 1341. A sentence of two years' imprisonment was imposed. Petitioner had requested a separate trial, dismissal of the indictment for pre-indictment delay, and a continuance to obtain separate counsel. The questions presented for review in this Petition arise out of refusal of the District Court to grant these motions. Petitioner adopts as his complete statement of the case the matters set forth in petitioner's brief in chief in the court below including petitioner's summary of the evidence, pages 2-13 inclusive.

Melvin S. Bornstein acquired an inactive insurance company in 1961 with the financial assistance of Albert Rosenthal. Subsequently the company was activated and renamed Whitehall Mutual Fire and Marine Insurance Company. The general representation and subrogation work of Whitehall was handled by an outside firm of attorneys from the company's inception until some time in 1962. None of the subrogation claims handled by that firm were the subject matter of the indictment.

In July of 1962, Nathan Grossgold, the Petitioner's brother-in-law, came to Chicago from New York to join Whitehall. Mr. Grossgold was an attorney in the suburban area of New York City and had been admitted to the Bar in New York State in 1942. He had conducted a general

law practice in New York and was admitted to practice in Illinois by motion shortly after his arrival in Chicago. Grossgold was first employed by Whitehall as a Claims Manager, but after a dispute arose between him and another of the executives, he left the employment of Whitehall and established his own law practice with offices located on Whitehall's premises. As Claims Manager, Grossgold had complete knowledge of Whitehall's subrogation files. After he left his position as Claims Manager, Grossgold was retained by Whitehall on a contingency fee basis to prosecute subrogation matters for Whitehall. The nine counts of the indictment arise entirely out of the subrogation matters referred to Mr. Grossgold.

On June 18, 1968, four days prior to the running of the statute of limitations on the counts of the indictment, an indictment was returned against the Petitioner and Nathan Grossgold. Whitehall had ceased activity as a going concern in December of 1963.

The Petitioner was indicted by the grand jury on June 18, 1968. He was arraigned on July 8, 1968, at which time he pleaded not guilty.

The case was tried before a jury from March 3 to 7, 1969. At the conclusion of the government's case, counsel for the Petitioner moved for a judgment of acquittal, which was overruled. Counsel for the Petitioner and his co-defendant then presented their case. Each defendant testified, as did the co-defendant's secretary, who testified that she had sent out the larger bills, which constituted the alleged fraud, on her own initiative. Following this examination which demonstrated that the Petitioner had acted in good faith and without knowledge of the misrepresentations, his counsel moved for a judgment of acquittal. This motion

was overruled. The jury returned a verdict of guilty and sentence was imposed on April 30, 1969.

The Petitioner appealed his conviction to the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the District Court.

Reasons for Granting the Writ

I. In holding that the District Court neither abused its discretion in not granting the petitioner a continuance for separate trial counsel with the concomitant implication that separate counsel were not required, nor admonished the petitioner of the risks in proceeding with a single attorney to represent him and his co-defendant, an attorney, the United States Court of Appeals for the Seventh Circuit rendered a decision in conflict with the decision of another Court of Appeal on the question of when a District Court abuses its discretion or fails in its duties in regard to separate counsel for co-defendants.

Throughout these proceedings the essential contention of the petitioner has been that in the circumstances of the case the District Court was required to grant him a separate trial, or in the alternative, and as a minimum standard of due process grant him an opportunity to obtain separate counsel. The Court of Appeals held that the District Court was not in error because in fact more than 60 days elapsed after the denial of the renewed motion for separate trials and separate counsel, and the commencement of the trial. What the District Court did, and what the Court of Appeals permitted it to do, was to engage in speculation regarding the conflict between the defendant's defenses, and subsequent proof, without regard to the professed conflict between the defendants as shown by their motion.

The decision of the Court of Appeals, if permitted to stand, completely destroys the concept of an affirmative duty on the part of the District Court judge to secure for

defendants a fair trial and due process of law. Moreover, the holding that the District Court neither abused its discretion in refusing to grant separate trials, or a continuance for separate counsel is directly in conflict with the decision of the Court of Appeals for the District of Columbia. *Campbell* v. *United States,* 352 F.2d 359 (D.C. Cir. 1965). The trial court did not admonish petitioner of the risks involved in having only one attorney for both defendants.

The statements contained in petitioner's renewed motion for a separate trial and separate counsel clearly make out a case for a severance. The motion is set out in full in Appendix B. The following excerpts should indicate that a prima facie case was made for severance, or, at the minimum, separate counsel. The co-defendant stated the nature of his defense and the petitioner indicated his opposition to this theory of the case:

> "The examination of documents which did occur in the presence of the prosecutor and the Postal Inspector, demonstrates to counsel for the defendants that there is a substantial conflict in the defenses of the defendants, and that their defenses are antagonistic to each other, in that the defendant Grossgold was an attorney who presented claims on behalf of the Whitehall Mutual Fire and Marine Insurance Company based upon documentary and other evidence supplied to him by employees of the Company who operated under and where directed by the defendant Melvin S. Bornstein as an executive officer of that Company.
>
> "Thus his defense of good faith and lack of knowledge of any fraud or misrepresentation will in part rely upon the presentation to him of papers prepared under the general direction of defendant Bornstein. Obviously this defense by Grossgold will tend to throw responsibility for fraudulent documents and misrepresentations upon the defendant Bornstein, which the

defendant Bornstein has informed counsel, is unsatisfactory to him, and it now appears that each defendant is entitled to his own counsel."

In upholding the decision of the District Court, the Court of Appeals implicitly adopted a "wait and see" test in regard to the petitioner's rights to a separate trial or separate counsel. When the record disclosed that the defendants did not in fact exercise their right for separate counsel, and were convicted in a joint trial, the Court of Appeals affirmed the decision. Thus, by the entire record, it concluded that no error had been committed in the denial of the defendant's motion.

This reasoning is manifestly unfair in light of the substantial conflict which was revealed in the co-defendant's separate briefs on appeal. Each contested the sufficiency of the evidence against him. Each directly or indirectly argued that the other was solely responsible for the malfeasance which was the basis of the indictment, and each argued that an aspect of the attorney-client relationship insulated him from the transactions. Grossgold claimed that as an attorney, he had a right to rely on documents given to him by his client as being accurate and genuine. The petitioner whose position has greater support in the case law argued in the Court of Appeals, and petitions this Court to recognize his right to rely on counsel to handle legal matters referred to him, in a lawful manner, and to advise his client of the lawful course of conduct in the client's legal matters.

II. Certiorari should be granted to review the holding of the Court below to the effect that the petitioner failed to make out a case for dismissal of the indictment for prejudicial pre-indictment delay, because the witnesses who died prior to trial would ". . . both . . . have incriminated Bornstein if they were alive and had testified. Their death prior to trial was in effect prejudicial to the prosecution and not the defense." In so holding the Court failed to recognize that a defendant has a right to meet charges against him, promptly, while his evidence is still available and not rely exclusively on infirmities in the government's case against him as guaranteed by the Sixth Amendment right to speedy trial.

Certiorari should be granted to review the holding of the Court below to the effect that the petitioner failed to make out a case for dismissal of the indictment for prejudicial pre-indictment delay, when in fact witnesses did die and documents were destroyed prior to indictment and trial, and when the indictment was returned after the expiration of the relevant state statute of limitations, and pre-indictment delay served no legitimate state or federal governmental purpose.

In *Dickey* v. *Florida*, 398 U.S. 30, 37, 38 (1970) this Court observed:

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charged rather than rest on the infirmities of the prosecution's case as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to

> a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."

The Court below distinguished *Dickey* v. *Florida, supra,* by pointing to the eight year delay in that case and the repeated demands for trial there, as contrasted with the nearly five year delay in the present case and the absence of a demand for trial.

The petitioner in the present case was faced with a somewhat different problem. Dickey at least knew charges were pending; here there was a delay of five years less four days before indictment and slightly more than sixty days to prepare a defense after petitioners had received the numerous documents, over 750, which were produced through discovery.

In *Dickey, supra,* the witnesses for the prosecution included a Mrs. Ralph Clark—the complaining witness, and a Deputy Sheriff Martin, who had taken the original complaint, and description, had shown a photograph of Dickey to Mrs. Clark, and had taken Mrs. Clark to the Jackson County jail to identify Dickey. By the time of trial, however, the jailer who had conducted the "viewing" had died, and Deputy Martin's memory had become hazy. His notes made during the course of the investigation had been destroyed. Dickey's defense was based on the testimony of another witness who could not be located.

This petitioner is also prejudiced because of the death of potential witnesses. The witnesses who died prior to trial were Anthony F. Zizzo and Rubin D. Katz. A third possible witness who died prior to trial was John P. Hoffman, whose involvement with Whitehall predated the alleged offenses, although evidence was introduced that predated

the offenses, and Hoffman arguably could have refuted such evidence.

Both Zizzo and Katz are designated in the Government's Answer to defendant's motion to dismiss and affidavit of Postal Inspector Potter (Appendix C) as potential witnesses for the prosecution. To accept the motion and affidavit of the postal inspector, however, is to give this affidavit greater credence than the possible testimony of those witnesses, had they lived and testified. As in the case of *Dickey* v *Florida*, *supra*, it must be presumed that these deaths were prejudicial to the petitioner. In that case the deceased jailer, and the destroyed notes could have strengthened the prosecution's case, yet their absence was considered prejudicial to the defendant.

In his concurring opinion, Mr. Justice Brennan illuminated some of the other interests protected by the Speedy Trial Clause. Speedy Trials are a more effective deterrent. They make it easier for the Government to prove its case, *Ponzi* v. *Fessenden*, 258 U.S. 254, 264, 42 S.Ct. 309, 66 L.Ed. 607 (1922); they prevent an accused from committing other crimes while at large awaiting trial and, deliberate Government delay in the hope of gaining an advantage over the accused, a practice not unknown, but which imperils the fair administration of criminal justice, is frustrated. An affirmance of the conviction of the petitioner in the instant case would violate these goals.

The petitioner's conviction negates the "Speedy Trial" protection he would have received under the Illinois Constitution. The Illinois Constitution in force at the time of the trial, the Constitution of 1870, provided:

> ". . . and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."
>
> Article II, Bill of Rights, Section 9

The Illinois legislature has implemented this constitutional guarantee in two different parts of the state criminal code. First by a statute of limitations which provided:

Chapter 38 Ill. Rev. Stat. (1965) sec. 3-5

> (a) A prosecution for murder, manslaughter, treason, arson, or forgery may be commenced at any time;
>
> (b) Unless the statute describing the offense provides otherwise, or the period of limitation is extended by section 3-6 [not applicable to the present offense] a prosecution for any offense not designated in Subsection (a) must be commenced within three years after the commission of the offense if it is a felony, or within one year and six months after its commission if it is a misdemeanor."

Illinois also has implemented by statute a speedy trial provision which provides in part that:

> Every person in custody in this State for an alleged offense shall be tried by the Court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant, by a competency hearing, or by an interlocutory appeal.
>
> Chapter 38 Ill. Rev. Stat. sec. 103-5(a) (1965)

If an offense was committed by the petitioner, it would have been theft under Illinois law, which is defined as follows:

> "A person commits theft when he knowingly:
>
> (b) Obtains by deception control over property of the owner; . . . .
>
> Penalty.
>
> A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed

> one year, or both . . . . A person convicted of theift of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to ten years.
>
> Chapter 38 Ill. Rev. Statutes (1965) sec. 16-1

The nine counts on which the petitioner was convicted arose out of mailings between June 17, 1963 and November 12, 1963. Five of the mailings were within Cook County, Illinois, and the remaining mailings were within the State of Illinois, two of these being to adjacent counties. The States Attorney of Cook County, Illinois could have sought an indictment against the petitioner as late as November of 1966.

The Illinois Department of Insurance was aware of Whitehall's difficulties in December of 1963 when the records of the Company were warehoused by the Department pending the appointment of a receiver.

Illinois authorities did not institute criminal proceedings against the petitioner. Sometime during the summer of 1966 (affidavit of Inspector Potter, appendix) the Bureau of Liquidation of the Department of Insurance of the State of Illinois referred some 140 files to postal authorities for investigation of alleged frauds. At that time it would have still been possible to commence a state prosecution.

Thus the petitioner's conviction is an instance of deprivation of state created rights to a Speedy Trial by the cooperation of Federal investigative and prosecuting authorities. This Court has previously decided that it is improper for Federal authorities to use evidence obtained by State officials which were obtained in violation of State law, *Elkins* v. *United States*, 374 U.S. 206 (1960).

The present case illustrates an example of the frustration of State law by Federal authorities of an equal magnitude.

The petitioner did not cause the delay in this case. His files were in the custody of State and Federal Governmental authorities from December of 1963 to the time of trial. Neither sovereignity sought to interview him or apprise him of the investigation for possible criminal offenses. The entire burden for the delay rests with State and Federal authority. When he requested, by motion, additional time to secure separate counsel, the only possible delay to be attributed to him, his request was denied.

What objective was served by the Government's delay in the present case? This is not an instance of moderate delay for the completion of undercover work involving a member of suspects. If anything it was a species of negligent delay, which has been condemned. *Hanrahan* v. *United States*, 121 U.S. App. D.C. 134, 139, 348 F.2d 363, 368 (1965).

If rights under the "Speedy Trial Clause" are to be balanced against other interests, it is clear that in the present case, the petitioner was not a person particularly within the ambit of special federal interest. The alleged offenses were basically intra-state in character, and the use of the mails, which gave rise to Federal jursidiction was only an incidental part of the alleged scheme. Federal action in such a case is not favored. Schwartz, *Federal Criminal Jurisdiction and Prosecutors Discretion*, 13 Law and Contemporary Problems 64, 73 (1948).

III. This Court should grant certiorari to settle the question whether the denial of a separate trial, when the co-defendants have mutually exclusive defenses, and the testimony of one, if called as a witness in a sepaarte trail, might exculpate the other, is a denial of due process of law as guaranteed by the Fifth Amendment.

Certiorari should be granted to review the holding of the Court below that antagonistic defenses between co-defendants and a showing that the testimony of a co-defendant is required by a defendant for exculpation is insufficient grounds for separate trials.

In the case at bar, the United States Court of Appeals for the Seventh Circuit states that: "Mutual hostility between the defendants is evident." The Court also states that: "Bornstein's defense was good faith reliance on attorney Grossgold who 'had complete knowledge of the files.' Grossgold's argument is that trial with Bornstein exposed him to a finding of guilt by association with Bornstein and Whitehall, since he was an attorney for Whitehall and tenant of the office space in the same building and relied upon bills prepared by Bornstein." Where co-defendants have such totally antagonistic defenses it is an abuse of discretion such as to deny due process to deny a motion for severance. The "hostility" that the Court below found is not a mere antipathy between co-defendants but a fundamental conflict between the defenses which are in fact incapable of reconciliation.

There was substantial evidence that Bornstein's defense of good faith reliance on Grossgold was more than an idle speculation. As to each count of the indictment there is no evidence that Bornstein ever procured any false repair bills. The evidence of the co-defendant's wife, who was also his secretary, when called as a prose-

cution witness supports Bornstein's defense of good faith. She testified in part as follows: "I didn't receive a file. I received certain papers from them. I never saw the Whitehall file. The papers were the Statement of Loss, police report if there was one, and if there wasn't I would ask them to obtain it for me, one estimate or two estimates and that's about the amount. If there were one or two estimates I would usually use the larger one because that's the practice I had used before when I was working in New York, too, when we had accident cases. And then I asked Mr. Katz I believe it was, and he said 'use the larger one.' I did not tell my husband I was using the larger one. He knew I was just doing my work. He didn't get me on each item." This line of testimony if fully developed in petitioner's case in chief would have been disastrous to Grossgold but would have tended to exculpate petitioner. Similarly, petitioner was denied an opportunity to call Grossgold as a defense witness in his case in chief. In the case at bar the degree of antagonism was so great as to render the defenses mutually exclusive.

Within the rubric of the Fifth Amendment protections the petitioner would have been barred from even calling Grossgold to the stand as a defense witness during the joint trial. The Court below in *U.S.* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965) cited with approval *United States* v. *Housing Foundation of America, Inc.*, 176 F.2d 665, 666 (3rd Cir. 1949) which held: "The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against him. Both come within the protection of the clause of the 5th Amendment which provides: 'No person * * * shall be compelled in any criminal case to be a witness against himself.' The plain difference between witness and accused is that

the latter may not be required to take the stand at all. * * * *". The vice is not cured by the fact that Grossgold took the stand on his own behalf during the trial; petitioner was denied the opportunity to call Grossgold in petitioner's case in chief. The Court below held in *U.S.* v. *Echeles, supra*: "It should have been clear at the outset that a fair trial for Echeles necessitated providing him the *opportunity* of getting the Arrington evidence before the jury, regardless of how we might regard the credibility of that witness or the weight of his testimony."

A timely pre-trial motion for severance was filed setting forth the conflict between petitioner and his co-defendant; it is apparent both from the representations in the motion for severance and from the testimony of the co-defendant's wife that the testimony of the co-defendant would have operated to exculpate the petitioner. The Seventh Circuit's holding which requires a severance when a defendant seeks to call a co-defendant to testify as to matters which would exculpate the defendant is adhered to by the Fifth Circuit *Byrd* v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970). The Fifth Circuit differs from the Seventh Circuit in that it would empower the trial judge to inquire into credibility or weight of the potential testimony and also allow an inquiry into the likelihood of the testimony being presented. In the case at bar the trial court had sufficient information to conclude that the testimony of Grossgold would be of great importance in exculpating the petitioner; neither the prosecution nor the trial Court inquired as to the likelihood of the co-defendant testifying in a separate trial.

There appears to be little doubt that a trial judge must protect an accused's right of silence. *DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962). And it is

equally clear that no co-defendant can be called to the stand as a witness against his will. Yet if fundamental fairness is to be assured a defendant must have the opportunity to call a co-defendant whose testimony may exculpate him. To quote again from *DeLuna, supra*: "The exclusive control of the conduct of the trial is in the hands of the presiding federal judge. He is 'not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' He has the decisive role in assuring an accused a fair trial according to federal standards. 'Federal judges are not referees at prize fights but functionaries of justice.'"

Here the simple and just resolution of the dilemma would have been to order separate trials.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17860 and 17861
SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

No. 17860
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MELVIN S. BORNSTEIN,
Defendant-Appellant.
No. 17861
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NATHAN GROSSGOLD,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 9, 1971

Before KILEY and CUMMINGS *Circuit Judges,* and MORGAN, *District Judge.*[1]

KILEY, *Circuit Judge.* Defendants Bornstein and Grossgold were each convicted by a jury under nine counts of an indictment charging violations of 18 U.S.C. § 1341 in the use of mail to further a scheme to defraud. Both have appealed. We affirm.

Bornstein and Albert Rosenthal, a "relative" of Bornstein, formed the Whitehall Insurance Company in

[1] Judge Morgan of the Southern District of Illinois is sitting by designation.

1961. In May, 1961, they acquired an inactive insurance company and activated it under the name of Whitehall Mutual Fire and Marine Insurance Company. Bornstein's brother-in-law, Grossgold, a New York attorney, became claims manager of Whitehall in 1962. In March of 1963 his employment by Whitehall was terminated, but as an independent attorney working in the Whitehall office building he continued to handle subrogation claims for Whitehall against other insurance companies on a percentage basis. It is upon the falsity in documents supporting the subrogation claims filed by Grossgold that the charges of fraud before us are based.

Whitehall ceased doing business in December of 1963, and its assets and records were turned over to the Illinois State Bureau of Liquidations in November of 1964. The indictment before us was filed in June, 1968.

Each defendant contends that the evidence is insufficient to sustain the verdict against him; that he was denied his constitutional right to a speedy trial; that reversible error was committed by the court's denial of a severance of his trial from that of the other; and that he was prejudiced by denial of continuance to obtain another lawyer.

I.

Defendants contend there is insufficient evidence to support the guilty verdicts. We see no reason to discuss in detail the abundant proof adduced at trial to sustain the verdict. The fraudulent scheme was shown by the testimony of Palumbo, one of the garage owners involved in the scheme, that either Bornstein or Grossgold would call him to make arrangements for repair of a damaged automobile covered by a Whitehall policy. After examining the car, Palumbo would make up a written estimate for the cost of repairs and convey it to Whitehall, and an agreement would be made between Palumbo and Bornstein or Grossgold to repair the automobile at a cost lower than the estimate. The estimate, marked "paid," would then be sent to the insurer of the person whose car collided with that of Whitehall's insured, along with a subrogation claim written by Grossfold. Whitehall would then be paid the amount stated on the estimate.

This testimony was fully corroborated by Whitehall's files. For example, insured Baugh's file, used in proof of Count V, contains an estimate on Palumbo's stationery in the amount of $190.25, marked "paid;" a cover letter written by Grossgold to Economy Fire and Casualty Co., insurer of the driver of the other automobile involved in the Baugh collision, referring to "the paid repair bill in the amount of $190.25" which was sent with the letter; and a check from Economy in the amount of $190.25 made payable to Baugh and/or Grossgold. The file also shows a bill from Palumbo for "agreed price $150.00" minus "$100.00 Ded.," with a balance due of $50.00; a check made payable to Palumbo in the amount of $50.00 signed by Melvin Bornstein on behalf of Whitehall; and a letter to insured Baugh directing him to pay his $100.00 deductible directly to Palumbo. Palumbo testified that he and Whitehall agreed on $150.00 to make that particular repair, and that he received $100.00 of that amount from the insured (the policy had $100.00 deductible) and $50.00 from Whitehall. The pattern was followed, generally, with respect to each count in the indictment.

There is ample proof to justify the jury in inferring that both Bornstein and Grossgold knowingly participated in the proven scheme to defraud. In addition to Palumbo's testimony as to the active participation of both Bornstein and Grossgold, there is the testimony of Pekin, another Whitehall employee who occasionally wrote letters regarding subrogation claims, that Bornstein told him that the reason the subrogation claims were inflated was to cover legal costs and handling expenses. And the record also contains a note written by Bornstein to Grossgold directing Grossgold to see if he could collect on another subrogation claim, and if he could, Whitehall would "pay and get subro agreement for better amount."

There is also evidence that Grossgold, who directly handled the subrogation claims, wrote a note to an uninsured motorist whose car had collided with that of a Whitehall insured, concerning arrangements for payment of a subrogation claim in the amount of $500.00. The top of the Whitehall file in that case reflected that

total payments by Whitehall were only $350.00, and Grossgold admitted that he had written on the Whitehall file a notation of a conversation with the uninsured motorist. And the note from Bornstein and another note from Palumbo indicated that Grossgold was aware that Whitehall sent out inflated subrogation bills, even if Grossgold did not pursue the claims in those particular cases. There is substantial evidence that both Bornstein and Grossgold knew the subrogation claims were fraudulent.

In imprisoning Bornstein for two years, and merely fining Grossgold, the district court evidently had in mind the pro rata fraudulent participation of defendants in the several offenses. The distinction between the defendants' guilt shown in sentencing, however, is no indication that the joint trial resulted in the jury's convicting Grossgold merely because of his association with Bornstein. Rather the sentences show the court's determination of the degree of guilt of each defendant.

II.

The crimes charged in the indictment are alleged to have occurred between June 17, 1963 and December 4, 1963. Whitehall voluntarily turned over its books and records to the Illinois Department of Insurance at the end of 1963.[2] The Department alerted the postal authorities who in 1965 or 1966 began the investigation which led to the indictment. The investigation, involving over 140 files, ended on April 18, 1968. The indictment followed on June 18, and the jury returned its verdicts March 10, 1969.

During the investigation interviews were conducted of Whitehall's insureds and of persons insured by other companies. Hoffman, a claim adjuster for Whitehall, died in January, 1963. Zizzo, owner of one of the garages allegedly involved in the scheme, was interviewed in March, 1968, and died in October, 1968. Katz, another Whitehall adjuster, was interviewed in February, 1968, and died in November, 1968. The investiga-

[2] The books and records were warehoused by the Department until a liquidator for Whitehall was appointed in 1965 and the records removed for examination by the Department.

tion ended and the report was given the United States Attorney in April, 1968.

Postal Inspector Potter who conducted the investigation filed an affidavit in support of the government's response to defendants' motion to dismiss the indictment for the delay. In this affidavit, Potter stated that Zizzo told him at the March 1968 interview that he had, at Bornstein's request, "inflated bills" for repairs and either mailed or delivered them to Bornstein; and that Katz told Potter at the February interview that he worked for Bornstein, that Bornstein and Grossgold took care of all the claim work and that Katz always turned over the work to Bornstein. No written statements were signed by Zizzo or Katz and neither testified before the grand jury.

Both defendants contend that this delay between the time the offense was committed and the day the indictment was returned denied defendants the right to a speedy trial and to due process. Both defendants rely upon *Dickey v. Florida,* 390 U.S. 30 (1970), and the prejudice resulting from the delay. Specifically, the prejudice relied upon is the death of Zizzo and Katz, and the destruction of part of Grossgold's records—all of which events occurred between 1965 and 1968.

We see no merit in the contention that the district court committed reversible error in denying the motion to dismiss. The statute of limitations would have run against the offenses if indictment was delayed four days longer. But this is not conclusive, *United States v. Haggerty,* 419 F.2d 1003 (7th Cir. 1969). *See United States v. Ewell,* 383 U.S. 116 (1965). It had not run when the indictment was filed, *United States v. Panczko,* 367 F.2d 737 (7th Cir. 1966), and while it is possible that a delay within the statute of limitations could be so unreasonable and prejudice so great that due process would be violated, *United States v. Deloney,* 389 F.2d 324 (7th Cir. 1968), this is not such a case.

The affidavit of Potter indicates that both Katz and Zizzo would have incriminated Bornstein if they were alive and had testified. Their death prior to trial was in effect prejudicial to the prosecution and not the de-

fense. And Grossgold's indirect benefit from Zizzo's and Katz's statements that they dealt with Bornstein was minimal in view of the ample testimony of Grossgold's main participation, through his work as attorney in preparation of the subrogation claims. Also, Hoffman's testimony would have been of no value to the defense since he died in January of 1963, at time prior to most of the activities alleged in the indictment. And we are unable to see how Grossgold's destruction of his records could prejudice him under the facts here.

Dickey v. Florida, supra, does not compel a decision here that the delay was a violation of defendant's right to a speedy trial. In *Dickey* there was an eight year delay between arrest and trial, during which Dickey continually demanded trial, and the prosecutor provided no good reason for rejecting the demands. Here there was a two year delay in discovery of the possible fraud and a three year delay during which the postal authorities examined 140 files and selected 29 files for further investigation. This delay is not unusual in a case which requires extensive investigation of documents. We cannot say that it constituted "[d]eliberate governmental delay designed to harm the accused" condemned in *Dickey.* This case is closer to *United States v. Lee,* 413 F.2d 910 (7th Cir. 1969). There we rejected a similar claim on the basis that testimony at the trial showed no prejudice and defendant was able to recall specific facts concerning the incident in question.

III.

Each defendant also claims reversible error in the court's denial of each defendant's motion for severance. This ruling was made within the court's discretion. *United States v. Echeles,* 352 F.2d 892, 897 (7th Cir. 1965). We see no abuse of discretion. Implicit in each one's argument on this point is a claim of prejudice in being tried with the other—the culprit. Bornstein's defense was good faith reliance on attorney Grossgold who "had complete knowledge of the files." Grossgold's argument is that trial with Bornstein exposed him to a finding of guilt by association with Bornstein and

Whitehall, since he was an attorney for Whitehall and tenant of the office space in the same building and relied upon bills prepared by Bornstein.

Mutual hostility between the defendants is evident. But that does not alone control the court's discretion on the severance motions. *Dauer v. United States,* 189 F.2d 343, 344 (10th Cir. 1951), *cert. den.,* 342 U.S. 898. The district court was not required on the showings made to conclude that the respective asserted defenses precluded a fair trial to each. *See United States v. Hutul,* 416 F.2d 607, 620-21 (7th Cir. 1969). Although each sought to escape conviction by placing the guilt on the other, their defenses were actually compatible since both claimed ignorance of the transactions.

Defendants cite *United States v. Echeles,* 352 F.2d 892 (7th Cir. 1965), and *Campbell v. United States,* 352 F.2d 359 (D.C. Cir. 1965). Those cases are distinguishable. In *Echeles,* a co-defendant made a statement which could have exculpated the defendant and this court ordered a severance. In *Campbell,* the evidence against one defendant was overwhelming and the evidence against the other insignificant. The court ruled that the defendants' trial should be severed because the person against whom the evidence was slight could be prejudiced by being tried with the other defendant. The showings made by the defendant in both those cases went far beyond a showing of hostility.

IV.

Both Bornstein and Grossgold claim prejudice in denial of their motion for a continuance in order to obtain an additional attorney. They argue that representation by the same attorney prejudiced each. We see no merit in this point. The motions for separate trials were made November 23, 1968, and a 60 day continuance was sought to obtain an additional attorney. Although the motion was not granted, the trial began more than 60 days after the motion was made. There was ample time to obtain the attorney before trial to avoid what prejudice, if any, resulted from lack of an additional attorney.

For the reasons given, the judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA, v. MELVIN S. BORNSTEIN and NATHAN GROSSGOLD	No. 68 CR 368

RENEWED MOTION FOR SEPARATE TRIAL

Now come the defendants, Nathan Grossgold and Melvin S. Bornstein, by their attorney of record, Maurice J. Walsh, and each moves the Court for a separate trial, alone and separate from the other, and in support thereof, states:

1. That heretofore the defendant, Nathan Grossgold, moved for a severance on the ground that he is a member of the bar of the State of Illinois and was attorney for the Whitehall Mutual Fire and Marine Insurance Company in certain cases involved in the prosecution, and that he conducted his representation of the said Company based on information and documents supplied to him by officers, agents and employees of the Company and persons and entities insured by the Company. The Motion further stated that the defendant Grossgold was bound by the relationship of attorney and client with the said Whitehall Mutual Fire and Marine Insurance Company and its principal officers, and Melvin S. Bornstein, who was a principal officer of the said Company, and that in a joint trial with said defendant, he may forbidden by such

relationship from asserting his full defenses in this matter.

2. That Motion for Severance stated that no other antagonistic defenses appeared at that point, nor were asserted other than that the defendant Grossgold then believed that his full opportunity to defend would be hampered and distorted in a joint trial with Melvin S. Bornstein.

3. The Government answered that Motion by a statement that many unwarranted assumptions would be necessary in order to warrant a severance.

4. Since the presentation of the first motion for severance, the Government has afforded the discovery by displaying many files, including files of insurance companies against whom the claims which are the subject of the allegations made in the indictment, were made, and purported files of the Whitehall Mutual Fire and Marine Insurance Company, which files were apparently obtained from the Illinois Department of Insurance which had seized them from the Whitehall Mutual Fire and Marine Insurance Company, and withhold from the defendants for several years prior to the indictment. These files consist of hundreds of papers, which were examined by the defendants with their counsel but in the presence of a Postal Inspector and the prosecutor, Mr. Conlon, who did not feel that they could permit the defendants and their counsel to examine the files and have private discussions, apparently in order to preserve custody of the files. To cope with this situation, the defendants, at substantial expense, have caused the Aims Copy Service to make copies of certain of said documents, and that said copies amount to many hundreds of pages, at least 750. These copies were delivered by the Aims Service to counsel for the defendants on Thursday, November 21, 1968.

Due to other engagements, there has been no opportunity to examine said copies for the purpose of preparing the defense as intended.

5. The examination of documents which did occur in the presence of the prosecutor and the Postal Inspector, demonstrates to counsel for the defendants that there is a substantial conflict in the defenses of the defendants, and that their defenses are antagonistic to each other, in that the defendant Grossgold was an attorney who presented claims on behalf of the Whitehall Mutual Fire and Marine Insurance Company based upon documentary and other evidence supplied to him by employees of that Company who operated under and were directed by the defendant Melvin S. Bornstein as an executive officer of that Company.

Thus, his defense of good faith and lack of knowledge of any fraud or misrepresentation will in part rely upon the presentation to him of papers prepared under the general direction of defendant Bornstein. Obviously, this defense by Grossgold will tend to throw responsibility for fraudulent documents and misrepresentations upon the defendant Bornstein, which the defendant Bornstein has informed counsel, is unsatisfactory to him, and it now appears that each defendant is entitled to his own counsel.

The completion of discovery has also indicated that there are three persons who are important to the defense of both of the defendants irrespective of conflict or antagonistic defenses, since the files produced contain documents relating to estimates of damage and paid bills for repairs to damages and reports by two employees and one repairman who are now deceased. They are:

John Hoffman, Claim Supervisor, who died in 1962

Reuben D. Katz, Claim Supervisor, who died about November 1, 1968

Anthony Zizzo, Repairman and Estimator from Cermak Auto Construction and the Sawyer Auto Repair Co., who died about November 1, 1968.

The Court's attention is called to the fact that while this indictment was returned in 1968, the mailings charged occurred no later than 1963. It is alleged that no prosecutive or investigative purpose was served by this long delay.

Wherefore, these defendants and each of them respectfully request that this case be re-set for trial on a reasonable date in 1969 to afford the defendants a reasonable opportunity to investigate the information recently secured by pre-trial production and which is so voluminous that it cannot be properly or efficiently investigated in less than 60 days. Defendants further request said delay for the purpose of securing separate counsel so that their respective antagonistic interests and defenses will be fully protected by counsel of their choice.

Melvin S. Bornstein and
Nathan Grossgold, Defendants,
By:
Maurice J. Walsh,
Their Attorney.

Received this ..... day of ....., 1968, a copy of the foregoing Motion.

.....

Thomas A. Foran
United States Attorney

By: .....

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Melvin S. Bornsein, being duly sworn, on oath states that he has read the foregoing Motion, and that the allegations therein are true.

Melvin S. Bornstein

Subscribed and Sworn To
before me this 22nd day
of November, 1968.

.....
Notary Public

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Nathan Grossgold, being duly sworn, on oath states that he has read the foregoing Motion, and that the allegations therein are true.

Nathan Grossgold

Subscribed and Sworn To
before me this 22nd day
of November, 1968.

.....
Notary Public

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA,
v.
MELVIN S. BORNSTEIN and
NATHAN GROSSGOLD
No. 68 CR 368

ANSWER OF THE UNITED STATES OF AMERICA TO THE DEFENDANTS' MOTION TO DISMISS THE INDICTMENT

Now comes the United States of America, by Thomas A. Foran, United States Attorney for the Northern District of Illinois, and, in answer to the defendants' motion to dismiss the indictment for prejudicial delay, attaches hereto and makes a part hereof the affidavit of Postal Inspector Eugene W. Potter.

.....
Thomas A. Foran
United States Attorney

RAM:MAN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA *vs.* MELVIN S. BORSTEIN and NATHAN GROSSGOLD	No. 68 CR 368

AFFIDAVIT

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Eugene W. Potter, being first duly sworn on oath, deposes and says:

1. That he is a Postal Inspector for the United States Post Office and has investigated this case from the inception.

2. That sometime during the summer of 1966 the Bureau of Liquidation of the Department of Insurance of the State of Illinois referred to the Post Office for investigation certain mail fraud allegations involving herein, and the Whitehall Mutual Insurance Company.

3. That on August 18, 1966 the case was assigned to your affiant.

4. Affiant immediately commenced examining approximately 140 files of the Whitehall Mutual Insurance Company.

5. After a thorough examination of approximately 140 Whitehall Mutual Insurance Company files, approximately 29 files were selected for further investigation.

6. Affiant then examined the files of various insurance companies who represented the persons involved in the accidents with Whitehall Mutual Insurance Company insureds, relating to all of the files in paragraph 5 above.

7. Affiant then attempted to locate the persons insured by Whitehall Mutual Insurance Company in each of the 29 files being investigated.

8. Affiant then interviewed the persons insured by Whitehall Mutual Insurance Company, as well as the persons employed by opposing insurance companies who settled claims with Whitehall Mutual Insurance Company.

9. On March 29, 1968 affiant, accompanied by Postal Inspector Greenan, interviewed Mr. Anthony F. Zizzo, of Cermak Auto Construction, 3241 West Cermak, Chicago, Illinois. Mr. Zizzo stated that he inflated bills for Mr. Bornstein on subrogation claims; and, that these inflated bills were either mailed or delivered to Mr. Bornstein personally. According to Mr. Zizzo, Mr. Bornstein was the one that had approached him concerning the inflated bills. Defense counsel has advised affiant that Mr. Zizzo died on October 15, 1968.

10. On February 8, 1968, Mr. Rubin D. Katz, former adjustor of Whitehall Mutual Insurance Company, was interviewed by affiant. According to Mr. Katz, he was employed and worked for Mr. Bornstein. He stated that Mr Bornstein and Mr. Grossgold took care of all of the claim work. Mr. Katz stated that he always turned in all information concerning claims to Mr. Bornstein. Defense counsel has advised affiant that Mr. Katz died on November 3, 1968.

11. Affiant completed his investigation on April 18, 1968 and presented the case to the United States Attorney on that date.

12. On June 18, 1968, the instant indictment was returned.

.....

Eugene W. Potter
Postal Inspector
United States Post Office

Subscribed and Sworn to before
me this .... day of February, 1969.

.....

Notary Public

RAM:mam